UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WILLIAM SIMPSON EDWARDS, Petitioner, vs. JOHN F. AULT, Respondent.	No. C03-4073-MWB **REPORT AND RECOMMENDATION ON RESPONDENT'S MOTION TO DISMISS AND ON THE MERITS**

This action was commenced by the petitioner William Simpson Edwards ("Edwards") on August 1, 2003, when Edwards filed a motion for leave to proceed *in forma pauperis*, and a proposed petition for writ of *habeas corpus* under 28 U.S.C. § 2254. (Doc. No. 1) The court granted Edwards's application, and the petition was filed as Docket Number 4 on September 3, 2003.

The respondent John F. Ault ("Ault") filed an Answer (Doc. No. 5) and a Motion to Dismiss "Mixed" Petition (Doc. No. 7) on October 6, 2003. On October 14, 2003, Edwards filed a *pro se* resistance to the motion (Doc. No. 9), and a motion for appointment of counsel. On October 17, 2003, before the court had an opportunity to rule on Edwards's motion for counsel, he filed a *pro se* "submission of state court documents," attaching copies of two briefs that were filed in his action for postconviction relief ("PCR") in the Iowa District Court in and for Woodbury County. (Doc. No. 10)

On October 23, 2003, the court granted Edwards's motion for counsel, and appointed Jeffrey M. Lipman to represent Edwards in this action. (Doc. No. 11) Edwards

disagreed with Lipman's advice regarding this case, and on January 15, 2004, Edwards filed a motion (Doc. No. 20) to withdraw Lipman from the case and allow Edwards to proceed *pro se*. Lipman agreed he and Edwards had irreconcilable differences of opinion regarding the case (*see* Doc. No. 24). On January 28, 2004, after a telephonic hearing, the court granted Edwards's motion, withdrew Lipman from the case, and granted an extension of time for Edwards to file a supplemental resistance to Ault's motion to dismiss. (*See* Doc. No. 23) On February 9, 2004, Edwards filed a supplemental brief in resistance to Ault's motion to dismiss. (Doc. No. 26)

The court now finds Ault's motion to dismiss to be fully submitted, and turns to consideration of the motion.

I. MOTION TO DISMISS

A. Background

On November 1, 1990, a jury found Edwards guilty of the first-degree murder and third-degree sexual abuse of a thirteen-year-old girl. Edwards filed a direct appeal in which he raised three issues, characterized by the Iowa Court of Appeals as follows:

> Defendant contends (1) the district court abused its discretion in denying his motion for change of venue, (2) his constitutional right to a fair trial by a cross-section of the community was violated, and (3) he was denied effective assistance of trial counsel because of his attorney's failure to object to what he contends were inflammatory and irrelevant statements made by the county attorney in closing arguments.

State v. Edwards, Iowa Sup. Ct. No. 90-1913, at 2 (Iowa Ct. App., Dec. 29, 1992). The Iowa Court of Appeals affirmed Edwards's conviction on all grounds. *Id.* Edwards's request for reconsideration was denied. Procedendo issued March 12, 1993.

Edwards filed a PCR action in Woodbury County. He raised several grounds for relief, but pursued only the issue of whether his trial counsel "was ineffective in discussing possible trial testimony of the defense expert in the presence of an FBI agent." *Edwards v. State*, Iowa Sup. Ct. No. 99-158, at 3 (Iowa Ct. App., Feb. 23, 2000) ("*PCR Appeal I*"). The District Court of Woodbury County granted the State's motion for summary judgment, finding Edwards had failed to show prejudice from any alleged ineffective assistance of either his trial counsel or appellate counsel. *Id.* On appeal, the Iowa Court of Appeals found a genuine issue of material fact existed precluding summary judgment. The court reversed and remanded "for the limited purpose of developing a further record as to whether original appellate counsel was ineffective in failing to raise the ineffectiveness of trial counsel claim and whether there was 'sufficient reason' to raise the ineffectiveness of trial counsel claim for the first time in a postconviction proceeding." *Id.* at 8.

On remand, after accepting further evidence, the district court again summarily dismissed the PCR application. *See Edwards v. State*, Iowa Sup. Ct. No. 01-1596, at 2 (Iowa Ct. App., Jan. 29, 2003) ("*PCR Appeal II*"). Edwards again appealed. The Iowa Court of Appeals found certain actions of Edwards's trial counsel had created a potential conflict of interest due to a mistake in counsel's judgment. However, the court found the error did not have an adverse effect on trial counsel's performance at trial and did not affect the fundamental fairness of the trial. Accordingly, the court found trial counsel's performance was not ineffective, and therefore, appellate counsel's failure to raise the issue of trial counsel's ineffectiveness also was not error. The court affirmed the denial of PCR relief. *PCR Appeal II*. Edwards's request for further review was denied. Procedendo issued April 24, 2003.

Edwards initiated the present action in this court on August 1, 2003.

B. Exhaustion and Procedural Default

In his petition, Edwards asserts the following four grounds for relief (quoted from the petition):

> A. Ground one: Denial of effective assistance of counsel trial/appellate. . . . Trial counsel coerced testimony from a defense expert witness[,] [w]hich denied defendant a fair trial consistent to [sic] the adversarial process.
>
> B. Ground two: Denial of right of appeal. . . . The state presented testimony given by an FBI speacil [sic] agent John Stafford which accuses trial counsel of coerced testimony for money. Appellate counsel was fully aware of this information. However, has no recollection nor idea why he did not raise the issue during his representation of the defendant. Denying defendant effective assistance of counsel trial/appellate.
>
> C. Ground three: Trial counsel prejudiced defendant's right to a fair trail [sic] by creating a conflict of interest. . . . Trial counsel created a conflict between himself/client by personal actions of instructing a witness how to testify. These actions discredited the attorney[']s creditable [sic] to represent his client. Trial counsel chose not to withdraw as counsel when it appeared to be in the best interest of the client.
>
> D. Ground four: Petitioner was denied his right to due process. . . . The state's deliberate misrepresentation of the evidence. It argues that trial counsel's actions were normal practice. However for the state to argue this as fact it creat[e]s misconduct on its part by presenting FBI special agent John Stafford's testimony to the jury and court as truthful. If trial counsel actions were normal/Stafford was perjuried [sic].

(Doc. No. 4, pp. 5-6)

In his motion to dismiss, Ault argues Edwards's allegations in paragraphs A, B and D, quoted above, were never raised "at trial, on direct appeal of the original conviction, in the postconviction pleadings, or on appeal of the postconviction ruling." (Doc. No. 7,

¶ 5) He argues, therefore, that because Edwards's petition contains exhausted and unexhausted claims, the petition is "mixed" and is subject to dismissal.

Edwards responds that he did, in fact, raise all four of the above-quoted grounds for relief in his *pro se* briefs in the PCR action. The court finds Edwards arguably raised grounds A, B and C in his briefs and arguments before the Iowa courts.

In both the present case and the PCR action, Edwards failed to state his assertions of error as clearly as a trained attorney might have done. For example, in ground B, above, Edwards frames the issue as "Denial of right of appeal," but it is clear from his explanatory statement that he is raising the issue of whether his appellate counsel was ineffective in failing to raise the issue of trial counsel's ineffectiveness. This issue was raised in the PCR action.

Similarly, in ground A, Edwards raises the issue of his trial counsel's ineffectiveness, an issue he argued in the courts below, although once again with a lack of clarity.

In ground C, Edwards raises the issue of trial counsel's ineffectiveness in creating a conflict of interest, an issue directly addressed by the Iowa Court of Appeals in the second PCR appeal.

The court finds that although his assertions of error are less than clear, Edwards at least arguably raised grounds A, B and C in the Iowa courts, giving those courts an opportunity to rule on his claims.[1]

However, the same cannot be said for ground D. Edwards attempted to raise some type of due process argument concerning prosecutorial misconduct in the PCR action, in

[1] *See, e.g.*, Ault's brief, Doc. No. 7, p. 8, where Ault notes Edwards "has raised and litigated in previous appeals and postconviction hearings the following: . . . (4) various allegations that previous counsel were ineffective for failure to allege that trial counsel Mike Williams had a conflict of interest affecting his representation of the petitioner that prejudiced his cause."

his "Appendix Brief for the Evidentiary Hearing Schedual [sic] for July 24th, 2001, at 9:00 AM." (Doc. No. 10, Attachment, at pp. 3-4) However, his argument in the PCR action was not the same as the ground for relief he raises here. Instead, in the PCR action, Edwards argued the State advanced different facts and legal theories on appeal than had been argued at trial; the State offered perjured testimony of Agent Stafford at trial; and the State acted in bad faith in offering Stafford's testimony. Further, he claimed that at the PCR level, the State somehow was trying to recharacterize Stafford's testimony, which was "intended to prejudice and deny petitioner's appeal from conviction." (*Id.*, p. 4) Whether or not Edwards intended to raise the same grounds in the present action, the court finds he failed to do so, and the assertion of error in ground D was never properly presented to the Iowa courts for resolution.

The United States Supreme Court, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999), held:

> Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.

Id., 526 U.S. at 842-43, 119 S. Ct. at 1731 (citations omitted). Further, subsection 2254(c), 28 U.S.C. § 2254(c), provides:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Thus, the court must determine whether Edwards can still raise the issue presented in ground D to the state courts of Iowa "by any available procedure." *See O'Sullivan*, 526

U.S. at 847, 119 S. Ct. at 1734. The court finds he cannot. The statute of limitations has run for Edwards to raise the issue in a PCR action. *See* Iowa Code § 822.3 (PCR application must be filed within three years from date procedendo issues following direct appeal). The basis for ground D has been known to Edwards since the time of trial, with the result that the exception under Iowa law that would allow him to raise the issue out of time is not applicable. *See id*. (exception for "a ground of fact or law that could not have been raised within the applicable time period"). As a result, ground D is not only unexhausted, it also has been procedurally defaulted. Edwards has not alleged cause and prejudice to excuse the procedural default, and his petition therefore should be denied as to ground D.

This would leave only exhausted claims A, B, and C for review, with the result that Ault's motion to dismiss on the basis that Edwards's petition is "mixed" should be denied, and the court should proceed to consider the exhausted claims.[2]

[2] "If a federal court that is faced with a mixed petition determines that the petitioner's unexhausted claims would now be procedurally barred in state court, 'there is a procedural default for purposes of federal habeas,' *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 2257 n.1, 115 L. Ed. 2d 640 (1991). Therefore, instead of dismissing the entire petition, the court can deem the unexhausted claims procedurally barred and address the properly exhausted claims." *Harris v. Champion*, 48 F.3d 1127, 1131 n.3 (10th Cir. 1995). *See Victor v. Hopkins*, 90 F.3d 276, 280 n.2 (8th Cir. 1996) (case in which exhaustion would be futile is exception to rule of *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), requiring dismissal of mixed petitions); *Duvall v. Purkett*, 15 F.3d 745, 746 (8th Cir. 1994), (a petitioner must pursue state post-conviction relief before coming to federal court "unless he has 'no available, nonfutile state remedies[.]'"); *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993) (when state procedural bar clearly would foreclose review of unexhausted claim, federal court may conclude return to state court would be futile and retain jurisdiction over mixed petition, although court generally may not reach merits of the unexhausted claim).

II. THE MERITS OF THE PETITION

The court now turns to the merits of grounds A, B, and C of Edwards's petition. Although Ault has not had an opportunity to brief these issues on the merits, Edwards has briefed his position thoroughly (*see* Doc. No. 4-1, brief in support of petition), and the court finds no further briefing is necessary to decide the case.

A. Applicable Law

All three of the issues Edwards has raised in his petition relate to the ineffectiveness of his trial counsel, and the ineffectiveness of his appellate counsel in failing to preserve trial counsel's ineffectiveness for appellate review. For a petitioner to prevail on an ineffective assistance of counsel claim, he ordinarily must satisfy the two-pronged test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the U.S. Supreme Court held that to prevail on a claim for ineffective assistance of counsel:

> *First,* the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added).

However, when a petitioner can prove by a preponderance of the evidence that an actual conflict of interest existed, prejudice is presumed, and the court examines only

whether counsel's performance fell below the normal range of competency. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333, 346-48 (1980). In *Cuyler*, the Court held that although the mere possibility of a conflict would be "insufficient to impugn a criminal conviction," 446 U.S. at 350, 100 S. Ct. at 1719, where a defendant can show "that a conflict of interest actually affected the adequacy of his representation [then he] need not demonstrate prejudice in order to obtain relief." 446 U.S. at 349-50, 100 S. Ct. at 1719 (citing *Holloway v. Arkansas*, 435 U.S. 475, 487-91, 98 S. Ct. 1173, 1180-82, 55 L. Ed. 2d 426 (1978); *Glasser v. United States*, 315 U.S. 60, 72-75, 62 S. Ct. 457, 465-67, 86 L. Ed. 680 (1942)).

Furthermore, in a habeas action, the petitioner must do more than satisfy the *Strickland* "performance" and "prejudice" tests, as modified by *Cuyler*. In addition, the habeas petitioner must show the decision of the state courts on the issue "was either (1) 'contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389 (2000) (quoting 28 U.S.C. § 2254(d)(1)).

Under the first category, a state-court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.*, 529 U.S. at 405, 120 S. Ct. at 1519. The Court explained:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Id., 529 U.S. at 412-13, 120 S. Ct. at 1523. Further, "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Court's] decisions as of the time of the relevant state-court decision." *Id.*, 529 U.S. at 412, 120 S. Ct. at 1523.

The second category, involving an "unreasonable application" of Supreme Court clearly-established precedent, can arise in one of two ways. As the Court explained:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id., 529 U.S. at 407, 120 S. Ct. at 1520 (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)). Thus, where a state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," that decision "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *Id*, 529 U.S. at 407-08, 120 S. Ct. at 1520. Notably,

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id., 529 U.S. at 411, 1250 S. Ct. at 1522.

If the state court decision was not contrary to clearly established Federal law, as determined by the Supreme Court of the United States, and if it did not involve an unreasonable application of that law, then the federal court must determine whether the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Thus, to prevail here, Edwards must show the Iowa Court of Appeals either (1) reached a decision contrary to applicable Supreme Court precedents on a question of law; (2) correctly identified the applicable law but then failed to apply the law reasonably to the facts of this case; or (3) made its decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Consideration of these questions requires some discussion of the facts underlying Edwards's claim that his trial and appellate counsel were ineffective.

B. Factual Background

Edwards's claims arise from matters surrounding the trial testimony of the defense expert witness Randell Libby, and FBI agent John Stafford, who was called by the State to rebut Libby's testimony. The Iowa Court of Appeals described the background facts as follows:

> Prior to trial, Edwards retained an expert witness to opine about certain DNA evidence. The expert and one of Edwards's attorneys traveled to the headquarters of the Federal Bureau of Investigation in Maryland to review certain records. An FBI agent remained in the room while they reviewed the documents.

> The case was tried to the court.[3] At trial the expert witness testified certain DNA records maintained by the FBI tended to exclude Edwards as the perpetrator. The State called the FBI agent as a rebuttal witness. He testified that, while defense counsel and the expert were reviewing records at FBI headquarters, defense counsel told the expert to use the term "exclusion" somewhere in his testimony.
>
> Following this direct testimony, Edwards's co-counsel suggested it might be necessary for the attorney implicated in the FBI agent's testimony to withdraw. The district court called a recess, after which co-counsel advised the court his colleague would not be called as a witness and he would not withdraw. Defense counsel who was present at the FBI headquarters proceeded to cross-examine the FBI agent. He did not attempt to discredit the agent's recollection, but instead suggested the FBI agent knew the statement had been made in jest. On redirect examination, however, the agent stated that defense counsel did not have a humorous or joking demeanor when he advised the expert witness what he should say.

PCR Appeal I, at 2-3.

The Iowa Court of Appeals elaborated further on the underlying facts in its review of the district court's second summary dismissal of Edwards's PCR action. The court noted Edwards had filed a PCR application "asserting trial counsel provided ineffective assistance when he discussed strategy with a defense expert in the presence of an FBI agent." *PCR Appeal II*, at 2. The court held as follows:

> We begin with defense counsel's statement to the defense expert before trial. [Footnote 2: The context was defense counsel's discussion of DNA evidence with the expert and, specifically, whether the evidence might exclude Edwards as the perpetrator.] According to the FBI agent, he said, "Dr. Libby, at some point in your testimony you must use the

[3]The court finds this statement was erroneous. Edwards's case was tried to a jury.

> term 'exclusion.'" The fact that trial counsel made this statement does not, alone, amount to a breach of an essential duty. *See DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002) (distinguishing between coaching and asking a witness to lie and stating "[a]ttorneys certainly have the right to prepare their witnesses. It would be foolhardy not to."). Defense counsel did not ask the expert to lie. [Footnote 3: Trial counsel asked the agent on cross examination, "[d]id I say, "no, no, Dr. Libby, you must say this"? The FBI agent responded, "No, sir."] Defense counsel also did not divulge any privileged information in the course of the discussion with the expert. [Citations omitted.] His discussion was, at worst, a mistake in judgment. [Citation omitted.]

PCR Appeal II, at 3-4.

These factual findings of the Iowa Court of Appeals are presumed to be correct for purposes of this action,[4] and the court finds nothing in the record to call the Iowa court's factual findings into question.

C. Legal Analysis

In considering Edwards's appeal, the Iowa Court of Appeals identified both *Strickland* and *Cuyler* as applicable law in the case. *See PCR Appeal II*, at 3-4 (citing *Strickland*, *Cuyler*, and *State v. Vanover*, 559 N.W.2d 618, 631 (Iowa 1997), which the court described as "affirming district court's disqualification of attorney based on potential conflict which imperiled Vanover's right to adequate representation"). As noted above, the Iowa court found Edwards's trial counsel's discussion with Libby in the presence of

[4] "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1).

FBI agent Stafford to be "at worst, a mistake in judgment." *PCR Appeal II*, at 4. The court further held as follows:

> The more troublesome question is whether trial counsel's statement created a conflict of interest. *See Cuyler*[,] 446 U.S. at 348, 100 S. Ct. at 1719, 64 L. Ed. 2d at 350 (holding defendant was required to show "that an actual conflict of interest adversely affected lawyer's performance"); *cf. Vanover*, 559 N.W.2d at 631 (noting potential conflict might imperil defendant's right to adequate representation). Edwards contends the statement, made in the presence of a potentially adverse witness, created an impeachment opportunity for the State to exploit at trial, forcing trial counsel to choose between withdrawing or continuing his representation. He claims this conflict mandates a new trial.
>
> We agree with Edwards that trial counsel's statement created a potential conflict. *See Vanover*, 559 N.W.2d at 629-30. Edwards's attorney elected to cross-examine the FBI agent with a view to eliciting a concession that his own statement to the expert was made in jest. The alternate course would have been to withdraw and testify himself. In either situation, he placed his credibility at issue. *Id.* However, his efforts to mitigate his own conduct also served the best interests of his client. For example, unlike the attorney in *Vanover* who personally interviewed and took a recorded statement from a codefendant and who thereby became a potential witness for the State, trial counsel here did not actively represent an interest adverse to Edward[s]'s. *See Cuyler*, 446 U.S. at 349, 100 S. Ct. at 1719, 64 L. Ed. 2d at 350. In other words, defense counsel did not "serve two masters." *State v. Thompson*, 597 N.W.2d 779, 785 (Iowa 1999) (quoting *Glasser v. United States*, 315 U.S. 60, 75, 62 S. Ct. 457, 467, 86 L. Ed. 680, 702 (1942)); *State v. See*, 387 N.W.2d 583, 535 (Iowa 1986) (noting attorney "represented neither multiple defendants nor prosecution witnesses, circumstances commonly creating conflicts" and "was not forced to choose one client

> over another" or "to weigh personal, pecuniary concerns against the client's best interests").
>
> We are left with a mistake in judgment that generated a potential conflict of interest. As a general rule, mistakes in judgment are not enough to establish ineffective assistance of counsel. [Citation omitted.] The fact that this mistake created a potential conflict of interest does not require us to deviate from the general rule, as there was no adverse effect on counsel's performance at trial. Having created fodder for impeachment, counsel attempted to minimize its impact. While in hindsight, we can say his effort was unsuccessful, the fundamental fairness of the proceeding was not called into question. *See Osborn [v. State]*, 573 N.W.2d [917,] 921 [(Iowa 1998)]; *cf. Mickens v. Taylor*, 535 U.S. 162, ---, 122 S. Ct. 1237, 1244, 152 L. Ed. 2d 291, 305, (2002) (noting prejudice presumed "only if the conflict has significantly affected counsel's performance – thereby rendering the verdict unreliable. . . ."). Accordingly, we conclude trial counsel's mistake did not rise to ineffective assistance of counsel. Because it did not, appellate counsel was not ineffective in failing to raise this issue on direct appeal and Edwards's claim is waived.

PCR Appeal II, at 5-6.

The Iowa Court of Appeals stopped short of finding Edwards's trial counsel's actions created an actual conflict of interest, instead finding that only "a potential conflict of interest" was created. This court agrees. The conflict created by counsel's conversation with Libby in Stafford's presence was not the type of conflict of interest contemplated by the Supreme Court in *Cuyler*, and does not rise to the level that would require a presumption of prejudice. The Supreme Court has explained it is only "where assistance of counsel has been denied entirely or during a critical stage of the proceeding," or "when the defendant's attorney actively represented conflicting interests," that the

circumstances will rise to such a magnitude that the court may "forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 1241, 152 L. Ed. 2d 291 (2002) (citing *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). The court finds Edwards has failed to show he was denied counsel during any stage of the proceedings, or that his trial counsel was actively representing conflicting interests. Despite counsel's error, the court finds he was, at all times, representing Edwards's interests and no others.

In the absence of an actual conflict of interest, the analysis of Edwards's ineffective assistance of counsel claims must be conducted pursuant to both prongs of the *Strickland* "performance" and "prejudice" test. A petitioner must satisfy both prongs of the test in order to prevail on an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. It is not necessary to address the performance and prejudice prongs in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one prong. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069. Indeed, the *Strickland* Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

Rather than focusing on the prejudice prong of the analysis, the Iowa Court of Appeals found Edwards's trial counsel's performance was not deficient. The court therefore did not reach the prejudice prong.

This court, on the other hand, finds the prejudice prong the easier of the two to resolve. Even if trial counsel's performance was deficient, the court finds Edwards cannot show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Edwards's protestations to the contrary, the jury was faced with ample evidence of his guilt, even ignoring the disputed DNA evidence. It was undisputed that Edwards and his girlfriend had been staying at the victim's home. The jury heard evidence that Edwards had confessed to the crime to two other inmates at the Woodbury County Jail. (*See* Trial Tr. 10-23-90, at 79-81; Trial Tr. 10-25-90, at 20, 26-28, 30-32) He described picking the victim up from school, taking her home and having sex with her, and then hitting her on the head with a stick when she threatened to report the incident. (*Id.*) Two other witnesses had seen a young white female get into a tan car matching the description of Edwards's car, with a black male driver. (*See* Trial Tr. 10-23-90, at 108-09, 111-12)

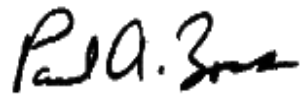
Based on the evidence, even if Stafford had not been allowed to testify, there is not a reasonable probability that Edwards would have been acquitted. Thus, Edwards cannot meet the prejudice prong of the *Strickland* analysis and, as a result, Edwards cannot prevail on his ineffective assistance of counsel claim. Because trial counsel was not ineffective, it cannot have been error for Edwards's appellate counsel to fail to raise the issue of trial counsel's ineffectiveness. For these reasons, the court finds Edwards's petition should be denied on the merits.

III. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[5] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, that Ault's motion to dismiss be denied, and that Edwards's petition for writ of *habeas corpus* be denied on the merits.

IT IS SO ORDERED.

DATED this 12th day of July, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[5]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).